

Virginia Water Policy: Legacy and Challenges

May 23, 2003

Legal Issues with Virginia Water Rights

What is the function of water law?

- Prevent disputes

- Protect the Riverine Environment

- Encourage the efficient use of water

 - For its full benefits

 - To prevent waste

Our current water law, which is common law, does not do these jobs well, principally because it fails to give certainty to water rights, and because it makes it difficult to get water to where it is needed most.

The Common Law right to use water is attached to land ownership. It is a real property right. The owners of land adjoining streams have riparian rights to use the waters of surface streams, and of underground streams whose course can be determined from surface features. The owners of the surface have the right to use percolating groundwater, that is groundwater that is not in such an underground stream.

A riparian landowner's use is always at the mercy of the reasonable uses of other riparians

- Certain riparian uses can exhaust the stream

A groundwater user is always at the mercy of neighbors who can lower the water level or even exhaust the aquifer. Also, the extent of the groundwater right is uncertain because the Virginia Supreme Court has not yet determined whether the English or American rule applies in Virginia. The English Rule allows unlimited use of groundwater. The American Rule allows a reasonable use on the overlying land, which means it cannot be exported.

There are no municipal and local government water rights independent of land ownership. Local governments must acquire water rights the same way as everyone else.

Water rights, like other property rights, are subject to the Commonwealth's police power, its right to control, regulate and permit the use of water in the public interest. But too much regulation may constitute a taking. But a taking of what? It's hard to say, because no fixed amount attaches to Virginia water rights.

Riparian Rights

The riparian landowner does not own the water. Rather, he has a legal right to make reasonable use of the water which runs in a natural course by his land. It may be used for domestic, agricultural or manufacturing purposes. He must use the water on riparian land and within the watershed of that stream. If a parcel is severed from the tract which borders the stream, the severed parcel is no longer riparian, and use of water on it is not permitted. His right of reasonable use is the same as the right in all other riparians. His use may not result in any important change in either the quantity or quality of the water if it damages the rights of another riparian. Because riparian rights are real property rights, they can be sold, rented, or lost by prescription. Also, they may be condemned by any entity with the power of eminent domain.

Unlawful Diversions and Interbasin Transfers.

A riparian owner may not divert water beyond the limits of his riparian tract of land, nor may he even use it on those parts of that tract which are outside of the riparian watershed, if by so doing he injures another riparian owner's use. The theory is that any surplus water not consumed on the riparian land of the first owner would find its way back into the stream and be available for use by the downstream riparian owners. A riparian owner therefore has no right to make an interbasin transfer, which would be a diversion to another watershed. See Opinion to the Honorable Thomas J. Rothrock, 71-72 Opinions of the Attorney General of Virginia at 79.

Where a dispute occurs between riparian owners, one use may be more reasonable than another under Virginia common law, which appears to favor domestic use and watering of cattle ahead of other uses. Indeed, some old cases suggest that

such uses could exhaust the entire flow of the stream. Upon a complaint and a showing by another riparian that he has been damaged, however, a court may restrain any unreasonable use and/or require him to pay damages to compensate the injured party. So long as no one complains, he may make whatever non-riparian use of the stream he wishes, but he has no legal right to do so. But if no one challenges his non-riparian use for twenty years, his unlawful use may mature into a right against downstream riparians, who necessarily must have been on notice of the reduced flow reaching their lands. But he gains no rights against upstream riparians who could not perceive a reduced flow.

Comparison with Prior Appropriation.

In the western United States, where water is scarce, water rights are based on who appropriated the water first, and it is for a fixed quantity of water. First in time, first in right. The first user has the right to all of the water in the stream until his right is supplied. This means that the holders of the third or fourth water right might expect to be cut off for some period of time during every dry period. The holder of the first water right could afford to rely on having water every summer, but the lower rights holders would either have to plan to survive dry periods without water, or build storage so they could hold water which their right entitled them to in wet seasons so they can survive in dry season.

Conclusion

Current water rights law is not adequate to provide for the water needs of Virginia's growing population and industry. Changes are needed to increase the certainty of protecting the water course, to increase the certainty of water rights, and to facilitate the trading of water rights so the market can assist in getting the water to where it is needed and can be put to the best use.

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For more detailed discussion of Virginia water rights law, see:

Water Resources Laws in Virginia, by William R. Walker and William E. Cox, Bulletin 9, Water Resources Research Center, VPI & SU, Blacksburg, Virginia 24061.

Virginia Water Law: An Economic Appraisal, by Thomas F. Bergin, State Water Control Board, January, 1976.

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